

STATE OF VERMONT
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

COMMISSIONER,
VERMONT DEPARTMENT OF LABOR,
Complainant

v.

Docket #RB898

J.A. McDONALD, INC.,
Respondent

**HEARING OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

FINDINGS OF FACT

This matter was held at the Office of the OSHA Review Board, 13 Baldwin Street, Montpelier, Vermont on June 12, 2013. Appearing for the State Department of Labor was Dirk Anderson, Esq. Appearing for the Company was Marc Boudreau and other supporting members of the Company.

Based on the evidence presented, both documentary and testimonial, the following Findings are made:

1. On February 8, 2012 a Compliance Officer, Tony Genung, was traveling by highway in an area in Bennington County.
2. Mr. Genung noticed that there was a large piece of machinery being run by an employee of J.A. McDonald, Inc. near an area of water.
3. When all was said and done, Mr. Genung did bring the matter to the authorities.

Pursuant to the investigation, the following violation was brought:

"1926.106(a). Employees working over or near water, where the danger of drowning exists, shall be provided by U.S. Coast Guard-approved life jackets or buoyant work vests."

5. The citation was dated June 5, 2012 and written by Robert McLeod, Manager.
6. The specific location of the alleged violation was Roaring Branch River Basin near the North Branch Street Overpass, Bennington, Vermont 05201.
7. Mr. Genung has seven years of experience. He had been in the submarine business in Connecticut. He has had numerous trainings in order to do his job properly.
8. On February 8, 2012, Mr. Genung was in Bennington and observed an excavator near the river. He determined quickly that an employee from J.A. McDonald was running the excavator. He observed immediately that the employee was not wearing a life jacket at the time.
9. In speaking with the foreman, it was determined that the original excavator machine was not working and the life jacket was left in that machine. Apparently the life jacket was not brought to the new machine which was running at the time Mr. Genung arrived. A photo was taken by Mr. Genung, admitted as "B.1" When one looks at the picture, it is a bit hard to determine how far from the water the excavator appeared to be. However, it is obvious that it was close to such water. When one looks at the picture, it does appear that there was a possibility that, should the machine be overturned, the employee could well have been submerged or close to being submerged in such water.
10. After meeting Mr. Genung, the driver of the excavator did go to get the life jacket. According to Mr. Genung, it took him approximately one half hour to go and get the life jacket.
11. At the hearing, witnesses described "post-Irene" interventions which took place after the huge storm hit Vermont. VOSHA employees traveled across the state to remind workers of the standards. Included in such reminders was the present rule involving life jackets when there were possibilities of drowning near water.
12. By cross-examination, Mr. Genung, the government official, attempted to show

that the excavator was in a "river basin." Evidently, the argument was that life jackets were not needed on this date in question.

13. The Company also stated an objection that the definition was vague relating to the question of what was meant by "over or near water."

14. The Company also, by cross-examination, attempted to show that there was no violation because, in part, Mr. Genung, had not spoken with the operator and had not asked how long he was working on the project.

15. It was contested by the Company that the project was just being finished up after a long time working on the project. In fact, it was the last day of the project. Also, there were no problems with the weather that day.

CONCLUSIONS OF LAW

16. Pursuant to Regulation 1926.106(a), "employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests." It is significant that the language states "shall" rather than "may." In other words, if machines are over or near water, the employees have an obligation to wear life jackets. Significant to this case, it was conceded by a company official that, in fact, they did have a life jacket in the other excavator. Apparently that excavator was not working on that day. Another excavator was needed for operation. There was certainly a precedent by the Company, as shown by that evidence, that life jackets were customarily used in excavators near water.

17. In addition, it was persuasive that VOSHA officials, especially post-Irene, went to all efforts to alert employees all over the state of proper standards needed to protect their employees. In fact, the Company called these efforts "interventions."

18. Also, in looking at the photos as admitted into evidence, it was quite clear to the

Hearing Officer that the definition of "working over or near water" was satisfied in this case.

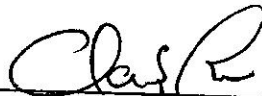
AMOUNT OF PENALTY

There was discussion at the hearing as to the reason why the adjusted penalty of \$1,500 was established. As shown by Exhibit C.1, the question of "gravity" and "good faith" was discussed. The Hearing Officer deems the penalty to be reasonable, after such discussion and viewing the exhibits. The amount of penalty will not be modified.

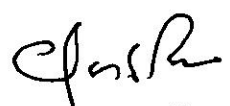
ORDER

The citation and penalty are hereby AFFIRMED by the Hearing Officer. Specifically, the Hearing Officer does affirm the finding that Regulation 1926.106(a) was violated in this case and as stated, supra, the monetary penalty is hereby AFFIRMED.

Dated at Montpelier, Vermont this 5th day of July, 2013.



Alan Rome, Esq.
HEARING OFFICER

Dated at Montpelier the 25th of July, 2013

Alan Rome